

ATTORNEYS at LAW

CLIMACO / LEFKOWITZ / PECA / WILCOX & GAROFOLI
CO., LPA

Anthony J. Garofoli (1936-2003)
Jack D. Maistros (1956-2001)
Paul S. Lefkowitz, Retired

April 11, 2007

Mr. Alan H. Sisselman, Chief Ohio Application Evaluation Section
Ms. Michele L. Hope, Architect/Project Manager
Mr. Mark Scalabrino
U.S. Army Corps of Engineers
Buffalo District
1776 Niagara Street
Buffalo, NY 14207-3199

2007 APR 16 AM 11:12

RE: Cleveland-Cuyahoga County Port Authority
Application for Department of Army Permit
Application No. 1999-0147 (4)
Cleveland Bulk Terminal

SUBJECT: Intentional Adverse Effects Determination
Pursuant to 36 CFR 800.9(c)

Dear Mr. Sisselman, Ms. Hope and Mr. Scalabrino:

We are in receipt of Mr. Sisselman's March 30, 2007 letter to consulting parties seeking comments of consulting parties to the intentional adverse effects determination letter to the Advisory Council on Historic Preservation. Please be advised that, for the reasons set forth in the letter from Dennis R. Wilcox to Mr. Scalabrino dated June 2, 2006, the Cleveland-Cuyahoga County Port Authority (the "Port Authority") hereby objects to the intentional adverse effects determination.

Although we do not wish to engage in time consuming debates over the background of the permit application and the alleged intentional adverse effect, we wish to emphasize herein the extensive public deliberations involving the Port Authority, the City of Cleveland and the Community over CBT, which we have detailed in the June 2, 2006 letter and in the Cleveland Bulk Terminal Section 106 Review Report prepared by Ted Sande, AIA, on 12 September 2005. We would also like to emphasize the economic impact which the Port Authority has on Cleveland, Cuyahoga County and Northeast Ohio.

Since our June 2, 2006 letter, throughput at CBT has continued to increase due to market conditions, as the following figures demonstrate:

| <u>YEAR</u> | <u>SHORT TONS at CBT</u> |
|-------------|--------------------------|
| 1999 | 1,196,652 |
| 2000 | 977,394 |
| 2001 | 736,669 |
| 2002 | 1,232,072 |
| 2003 | 1,889,494 |
| 2004 | 2,967,026 |
| 2005 | 2,918,043 |
| 2006 | 3,659,931 |

I attach at Tab A the Port of Cleveland, Year to Date, Short Ton tables for 1993-2003, 2004, 2005 and 2006 for your reference.

According to an Economic Impact Study of the Great Lakes St. Lawrence Seaway system, dated August 1, 2001, prepared by Martin Associates, the Port of Cleveland, supported by Port Authority activities, averages 13.1 million tons of cargo per year. Additionally, some 90% of cargo is produced or consumed within a 75-mile radius, which together with Port Authority activities provides our area with:

- 11,000 jobs,
- \$882 million in revenue,
- \$570 million in personal income, and
- \$200 million in local, state and federal taxes.

I attach for your consideration the Economic Impact Study (Tab B) and a Capacity Assessment dated February 2003 prepared by TranSystems Corporation. (Tab C) which, at page 18-20 further discusses the economic impact of the Port of Cleveland.

By way of this Permit Application, the Port Authority fully supports Oglebay Norton Company's efforts to fulfill its contract with First Energy and American Electric Power (AEP). As detailed in Mr. Siragusas' letter to Councilman Zone, dated 11 December 2006, a copy of

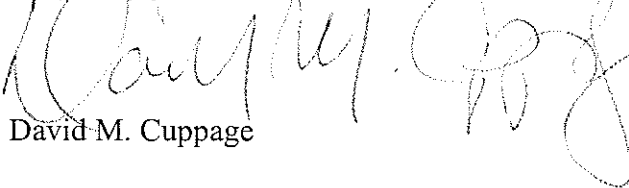
which is also attached at Tab D for your reference, these contracts will result in additional limestone shipments through CBT of nearly 1,000,000 tons annually.

Consistent with my letter dated February 27, 2007, I enclose a draft Memorandum of Agreement by and among the United States Army Corps of Engineers ("USACE"), the Ohio State Historic Preservation Office, the Advisory Counsel on Historic Preservation, the Cleveland-Cuyahoga County Port Authority and Oglebay Norton Company, Inc. Please note that I have not included the referenced attachments as they are quite lengthy and already in your possession.

On behalf of the Port Authority, we submit the draft Memorandum of Agreement ("MOA") in order to resolve the outstanding issues regarding the Port Authority's application for a Department of the Army Permit. We request that the USACE review the draft MOA and contact us to discuss this in more detail. We further request that this proposed MOA be adopted by the USACE and forwarded to the Advisory Council along with the Determination Letter and this correspondence.

In the meantime, should you have any questions, please feel free to contact the undersigned.

Very truly yours,



David M. Cuppage

DMC/ct

Enclosure

cc w/encl.: Rose Ann DeLeon
E.M. Jacobsen
Councilman Matt Zone
Michael Siragusa
Ted Sande
Dennis R. Wilcox, Esq.



City of Cleveland

Office of the Council

Matthew Zone

Councilman, Ward 17

*Committees: City Planning • Community & Economic Development • Finance •
Public Utilities, Chair*

2007 APR 23 PM 2:52

Alan H. Sisselman, Chief, Ohio Application Evaluation Section
Mr. Mark Scalabrino
U.S. Army Corps of Engineers
1776 Niagara Street
Buffalo, New York 14207

April 12, 2007

Reference: Cleveland-Cuyahoga County Port Authority Application No. 1999-0147 (4)

Dear Messrs. Sisselman and Scalabrino:

I am writing in response to your letter, dated March 30, 2007 seeking comments on the intentional adverse effects determination letter to the Advisory Council on Historic Preservation.

As a Cleveland City Councilman, whose ward includes Whiskey Island and the Cleveland Bulk Terminal (CBT) where the Hulett ore unloaders are stored, I have worked tirelessly for the past several years to find an agreeable solution to the issue. After painstakingly studying cost-benefit analysis of several options, engaging all stakeholders in good-faith dialogue, and countless meetings and conversation, I have proposed the only fair and acceptable solution.

The solution calls for preservation of key components of the Huletts to be displayed at educational, historical and public facilities. The remainder of the structure will be scrapped, with the revenue used to pay for transportation and preservation of the key pieces. After years of analysis, the "Zone MOA" is the only reasonable plan that will preserve and pay tribute to these important industrial relics.

Let me state clearly, that to begin with, I am in absolute disagreement with the \$110,000 determination. Additionally, I am wholeheartedly in favor of issuing a dredge permit.

Alan H. Sisselman, Chief, Ohio Application Evaluation Section
Mr. Mark Scalabrino
Page Two
April 12, 2007

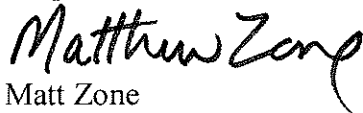
The Cleveland-Cuyahoga County Port Authority is one of the region's most vital economic assets. It strengthens the manufacturing base, promotes economic advancement and development, and has helped to retain and create nearly 30,000 jobs through its maritime, development finance and foreign trade zone activities, which can not be ignored. Furthermore, to believe that over-night \$6,000,000 dollars will fall into our lap to preserve both Hulets, is both unrealistic and shortsighted. Therefore, I strongly support the issuance of the dredge permit. Not issuing a permit to the Cleveland-Cuyahoga County Port Authority would have an enormous adverse affect on our city and the regional economy.

This solution is enthusiastically endorsed by the City of Cleveland, Cuyahoga County Commissioners, Cleveland-Cuyahoga County Port Authority, the Oglebay Norton Company, several local preservationists, and other interested organizations and individuals.

I hope you will join me in this sensible solution. I urge you to support the dredge permit for the Cleveland-Cuyahoga County Port Authority and the "Zone MOA" regarding the Hulets iron unloaders.

Thank you in advance for taking this letter into consideration. Should I be of any service or if I can provide additional information, please do not hesitate to contact me at 216.939.1717 or via e-mail at mattzone@sbcglobal.net.

Respectfully,



Matt Zone
Councilman, Ward 17

CC: Mayor Frank G. Jackson
Council President Martin J. Sweeney
Cuyahoga County Commissioners
Cleveland-Cuyahoga County Port Authority
Oglebay Norton Company
Please circulate to all consulting parties



OGLEBAY NORTON COMPANY
NORTH POINT TOWER
1001 LAKESIDE AVENUE, 15TH FLOOR
CLEVELAND, OH 44114

TEL 216-861-3300
FAX 216-861-2863

www.oglebaynorton.com

2007 APR 23 PM 2: 55

April, 20, 2007

Mr. Alan H. Sisselman, Chief Ohio Application Evaluation Section
Ms. Michele L. Hope, Architect / Project Manager
Mr. Mark Scalabrino
U.S. Army Corps of Engineers
Buffalo District
1776 Niagara Street
Buffalo, New York 14207-3199

RE: Cleveland-Cuyahoga County Port Authority Application for Department of Army
Permit - Application No. 1999-0147 (4) - Cleveland Bulk Terminal.

SUBJECT: Intentional Adverse Effects Determination Pursuant to 36 CFR 800.9(c).

Ladies and Gentlemen:

We received the letter dated March 30, 2007 from Mr. Alan Sisselman. Oglebay Norton Company ("Oglebay") is disappointed that the Army Corps of Engineers has determined that Cleveland Bulk Terminal ("CBT") experienced an adverse effect as a result of prior actions taken in connection with the Hullets and that Section 110(k) of the National Historic Preservation Act is applicable as a result of such actions.

Nonetheless, Oglebay supports the terms and conditions of the Memorandum of Agreement ("MOA") submitted by counsel for the Cleveland-Cuyahoga County Port Authority ("Port Authority") on April 11, 2007. Oglebay believes that the MOA represents the best and most balanced alternative to address the various interests involved with continued operation of CBT and the historical concerns surrounding the facility.

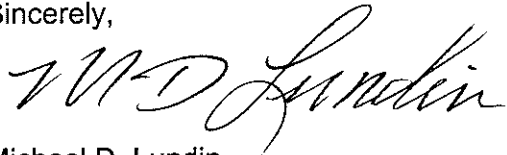
We are all aware that opportunities for economic growth in Northeastern Ohio have been elusive over recent years. However, within this challenging environment, Oglebay has successfully relocated the iron ore loading system from Lorain to CBT in support of Cleveland's steel industry and currently is handling 3,000,000 plus tons of iron ore pellets per year for Cleveland Cliffs and Mittal Steel.

Oglebay has also aggressively sought new and innovative applications for its industrial mineral products and as a result, has secured multi-year flue gas desulphurization contracts to supply First Energy and American Electric Power with limestone products brought to CBT from upper Michigan. These initiatives will increase tonnage across CBT, drive additional activity for Great Lakes Vessels and result in approximately 1,000,000 tons of additional throughput in 2007.

However, Oglebay cannot support these CBT initiatives without access to the entire CBT facility and approval of the dredge permit proposal submitted by the Port Authority.

We at Oglebay are excited and optimistic at the potential for CBT, but we cannot continue to pursue or support these enhanced opportunities without a resolution to the current issues surrounding the Hullets and the proposed necessary dredging. We encourage the adoption of the MOA as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "M-D Lundin". The signature is fluid and cursive, with the first name "M-D" being more stylized and the last name "Lundin" written in a more standard cursive script.

Michael D. Lundin,
President and Chief Executive Officer

DENNIS J. KUCINICH
10TH DISTRICT, OHIO

2445 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
(202) 225-5871

14400 DETROIT AVENUE
LAKEWOOD, OHIO 44107
(216) 228-8850

PARMA TOWN MALL
7904 DAY DRIVE
PARMA, OHIO 44129
(440) 845-2707



Congress of the United States
House of Representatives
www.kucinich.house.gov

CHAIRMAN,
SUBCOMMITTEE ON DOMESTIC POLICY
COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM
COMMITTEE ON EDUCATION AND LABOR

June 14, 2007

Mr. Mark Scalabrino
Biologist
U.S. Army Corps of Engineers
1776 Niagara Street
Buffalo, New York 14207-3199

Dear Mr. Scalabrino:

I write in support of the Port of Cleveland's efforts to dredge along the dock face of the Cleveland Bulk Terminal as permissible under our nation's laws, including the Clean Water Act and the National Historic Preservation Act (NHPA). I have no adverse information regarding the Port's and the U.S. Army Corps of Engineers' compliance with the Clean Water Act. However, I would recommend caution with respect to the NHPA so that the intentions of, and compliance with, that NHPA are not overlooked.

In 1966, Congress enacted the NHPA to help America's cities preserve their historic legacies in the face of urban renewal projects and the building of the Interstate Highway System. The NHPA recognizes that not every historic landmark will be saved, but provides a system that enables the people and their government to determine the value of historic properties relative to constant demands of changing circumstances.

I strongly support the NHPA and the regulatory process Congress envisioned through that Act. Section 106 establishes a process through which federal agencies must consult with the federal Advisory Council on Historic Preservation (ACHP) when the preservation of historic properties comes into question. Public involvement is a key part of that process, as outlined in the regulations at 36 C.F.R. Part 800. Section 110(k) of the Act provides guidance to agencies when there are circumstances which raise questions about compliance:

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106 of this Act, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the [ACHP], determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.



U.S. GOVERNMENT PRINTING OFFICE: 2006

In 1999, the Port of Cleveland sought permission to dredge along approximately 2,000 feet of the Cleveland Bulk Terminal dock face. Approximately 600 feet of the perimeter was maintenance dredging and the other 1,400 feet was for a proposed port expansion. The Port was informed by the U.S. Army Corps of Engineers, the regulatory authority under the Clean Water Act and the lead agency with respect to the NHPA, that dredging the entire 2,000 feet would require Section 106 review due to the presence and required removal of the Hulett Ore Unloaders. The "Hulett" are important markers of Cleveland's commercial history.

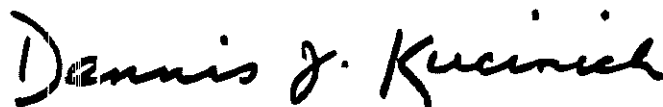
The Port subsequently modified its proposal and asked for only 600 feet of maintenance dredging. The Army Corps allowed the maintenance dredging without the need for NHPA review. However, the Army Corps also informed the Port that future dredging of the proposed expansion perimeter would require NHPA review with respect to the Hulett.

Subsequently, the Port removed the Hulett. Two Hulett were destroyed and two were dismantled for future construction at a location still to be determined.

In 2005, the Port resubmitted its application to dredge the entire 2,000 foot perimeter required for its proposed expansion. Although the Hulett were removed from the original site after the limited maintenance dredging, the Port's current request for an expansion dredging raises concerns anticipated by Congress when it drafted Section 110(k). Specifically, to what extent did the Port withdraw its original 2,000 foot dredging proposal in order to avoid the ACHP's and the public's scrutiny of the project as entitled to them under Section 106?

I strongly recommend that a formal NHPA Section 106 review be conducted at this time in order that the ACHP and the public have the opportunity to exercise their rights under law to review the expansion proposal and try to find a solution to the Hulett preservation problem. Section 106 is an essential component of the oversight Congress intended the people to have when it enacted the NHPA. It would be a disservice to the people as well as a violation of the law for the Army Corps and the ACHP to deny the people the chance to weigh in publicly and formally about the effects the proposed Port expansion will have on the historic property along the Lake Erie shore in Ohio's 10th Congressional District and beyond.

Sincerely,

A handwritten signature in black ink that reads "Dennis J. Kucinich". The signature is written in a cursive, flowing style.

Dennis J. Kucinich
Member of Congress

DJK:mg

Scalabrino, Mark W LRB

From: RRS [workace@sbcglobal.net]
Sent: Monday, June 18, 2007 12:25 AM
To: Sisselman, Alan H LRB; Scalabrino, Mark W LRB
Cc: mattzone@sbcglobal.net; ward20@clevelandcitycouncil.org; Ken Silliman; cndmm@cuyahogacounty.us; sjacobsen@portofcleveland.com; Robert Keiser; SBeimers@clevelandrestoration.org; Tim Donovan; Franco Ruffini; Marty Gelfand; rrs@citizensvision.org; Betsy Merritt; Charlene Dwin Vaughn; jeddins@achp.gov
Subject: CTSCH Comments to USACE Ref
Attachments: CTSCH comments to USACE FINAL.pdf

Mark W. Scalabrino
Alan H. Sisselman
United States Army Corps of Engineers
Buffalo District
1776 Niagara Street
Buffalo, NY 14207-3199

Re: PUBLIC NOTICE # 1999-01471(4) Section OH 10 Published March 3, 2006
Applicant: Cleveland-Cuyahoga County Port Authority

Sent via: e-mail (mark.w.scalabrino@usace.army.mil and alan.h.sisselman@usace.army.mil)

Dear Mr. Scalabrino and Mr. Sisselman:

Please find attached the The Committee to Save Cleveland's Hulets together with members Edward Hauser, James Korecko, Jerry Mann, Stephen Merkel, and Ray Saikus, and each as individuals comments regarding the draft letter to the Advisory Council on Historic Preservation.

Ray Saikus, President
Citizens' Vision
P.O. Box 32700
Cleveland, Ohio 44132-0700
Tel. (216) 514-7001
E-mail: rrs@citizensvision.org
URL: www.citizensvision.org

6/18/2007

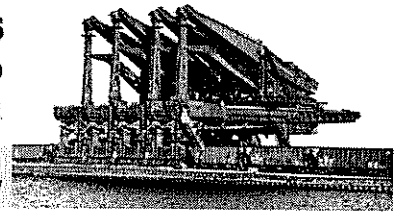
Committee to Save Cleveland's Hulett's

P.O. Box 32700 • Cleveland, OH 44132-0700

Tel (216) 378-0535 • Fax (440) 835-9441

A COMMITTEE OF
CITIZENS' VISION

E-mail: savehulett's@citizensvision.org
www.citizensvision.org/savehulett's/



15 June 2007

Mark W. Scalabrino
Alan H. Sisselman
United States Army Corps of Engineers
Buffalo District
1776 Niagara Street
Buffalo, NY 14207-3199

Re: PUBLIC NOTICE # 1999-01471(4) Section OH 10 Published March 3, 2006
Applicant: Cleveland-Cuyahoga County Port Authority

Sent via: e-mail (mark.w.scalabrino@usace.army.mil and
alan.h.sisselman@usace.army.mil)

Dear Mr. Scalabrino and Mr. Sisselman:

The Committee to Save Cleveland's Hulett's (hereinafter the "Committee"), together with members Edward Hauser, James Korecko, Jerry Mann, Stephen Merkel, and Ray Saikus, and each as individuals ("Individuals"), hereby respond to your letter of May 4, 2007 and received by the Committee on May 15, 2007, regarding the United States Army Corps of Engineers ("USACE") Draft Letter to Mr. John Eddins of the Advisory Council on Historic Preservation ("ACHP"), concerning the Hulett Ore Unloaders and the Whiskey Island Cleveland Bulk Terminal ("Hulett's") and on the National Register as the C&P Ore Dock.

We appreciate the USACE extending the time for us to finalize our comments. The Committee and the Individuals commend the USACE in concurring with us in their finding that Section 110(k) of the National Historic Preservation Act ("NHPA") applies to this dredging permit application by the Cleveland-Cuyahoga County Port Authority ("Port").

We are concerned that the USACE is willing to consider claims by the Port that have no relevance to the violation of Section 110(k), specifically, reference to "good" behavior and "potential economic impact" as justification of the disregard of the Nation Historic Preservation Act. To ignore lawbreaking on such basis would establish a bad precedent. A court may consider a criminal's "good" behavior when determining a sentence, but never does "good" behavior negate the fact that the criminal broke the law. And if economics can be used as a rationale for waiving the law, then that excuse could apply to virtually every case of violation of Section 110(k) in the country. Furthermore, the Port had the opportunity to act in accordance with the law, in which case there would be no economic hardship, but chose instead to flout the law. Thus any economic hardship the Port incurs is the consequence of its own actions.

Additionally the information being relied on and quoted is totally outdated (1997 Cleveland State University study) and misleading, in that the economic impact in the 3rd bullet point of page 4 of the Corps' draft letter to ACHP inaccurately applies an overall criteria for maritime operations in this area to the Port's operation at the Cleveland Bulk Terminal. Also it is very disturbing that this information is being taken for granted from an applicant, the Port, that is on the record to have attempted to circumvent the NHPA and has a record of disregard as well as abandonment of its commitments in previous agreements regarding the historic properties and to the citizens/taxpayers who fund the Port.

For the record, even though the USACE rightfully disagreed with his findings on effect on historical properties, we also object to the participation of Ted Sande, the Port's consultant, on the basis that we consider it a conflict of interest, a violation of professional ethics and extremely inappropriate. Ted Sande is a past member of the Landmarks Commission who sat at the meetings and voted on the issues and fate of the historical properties on Whiskey Island, including the Hulets, and the resolutions granting the Port demolition permits. Ted Sande, as a member of the Landmarks Commission, also failed to exercise his fiduciary duty to enforce the agreements for proper storage, the establishment of a foundation and verify the proper execution and retention of documents pertinent to the Landmarks Commission process regarding the C&P Ore Dock and the Hulets.

The promised and required formal Section 106 consultation has not taken place. We, the plaintiffs in the federal court case Committee To Save Cleveland's Hulets, et al. vs. the USACE, are committed to defending the legacy of the court's findings, and we are not planning to abandon our duty to our country and our fellow citizens nor to that legacy. We want to work with the USACE and the ACHP to achieve that goal. We ask the ACHP and the USACE to proceed with the Section 106 consultation process as it is intended.

In summary, the Committee to Save Cleveland's Hulets together with members Edward Hauser, James Korecko, Jerry Mann, Stephen Merkel, and Ray Saikus, strongly object to the Port obtaining the requested dredging permit without applying Section 110(k), for these primary reasons; others may apply:

I – We want to arrive at a proper remedy that has the elements to guarantee that the Port (and any other party contributing to the violation of federal, state, and local laws and agreements) deliver the resources to implement the solution of restoring the Hulett Ore Unloaders before any dredging permit is issued. We do not want any more empty promises or unenforceable agreements.

II – A formal 106 consultation has not been held. The first meeting was informal as stated by the representatives of the USACE (The video record of that meeting will confirm this fact.)

III – A Memorandum of Agreement has not been created and signed. Such a document, according to the Army Corps, must be part of any mitigation of adverse effects caused by the unlawful dismantlement and demolition of the

Historic Properties carried out by the Cleveland-Cuyahoga County Port Authority. We concur with the Army Corps' finding of applicability of Section 110(k) and violation of the NHPA.

IV – The USACE May 4th, 2007 draft letter to the ACHP states: “Despite the applicability of Section 110(k), the Corps has determined that the following circumstances may justify granting the Port Authority a permit for this action.” The USACE is misapplying the interpretation of “circumstances” and the listed bullet points are irrelevant for consideration of granting the permit, but we will address for purposes of clarification.

A) Myth: *The Port Authority followed Cleveland Landmarks Commission procedures and other agreements.*

Reality: Although the Port Authority complied with one of the Landmarks Commission requirements, they violated many others, as explained in more detail in the comment letter from the National Trust for Historic Preservation. In any event, the Section 106 process, which is the only procedure that counts here, was not followed. All other procedures which were followed, no matter how proper or improper, are irrelevant to justify dispensation.

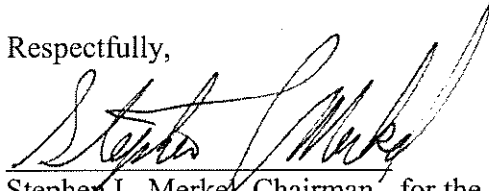
B) Myth: *Denial of a dredging permit would harm the Cleveland area economy.*

Reality: This argument is grossly exaggerated by the Port Authority. It is also irrelevant, because the Committee does not wish to have the Army Corps deny the Port Authority a dredging permit (which, yes, could conceivably harm the economy). Rather, the Committee fervently wishes to agree with the Port on a mitigation plan, which must include reconstruction of the Hulett Unloaders for the community, with funding in an escrow account controlled by agreed-upon organizations, as a precondition to a dredging permit for the Port Authority. Only in the case of failure to reach an agreement with the Port Authority about mitigation would the Committee take action that would result in denial of the dredging permit. The Port Authority has the final choice of how to act in such a way as to cause a dredging permit to be allowed or denied. In preparation for a Memorandum of Agreement (“MOA”), the Port has the duty to engage the City of Cleveland and Oglebay Norton Company (“Oglebay”) to find a solution satisfactory to the Committee and Individuals. The City has joint culpability with the Port and Oglebay as to the failure of proper storage of the Hulett's, and the establishment of a Foundation to raise funds for their restoration. The Committee and Individuals are willing to engage with the Port, City and Oglebay to find a solution that could lead to an MOA and the eventual granting of the permit.

As we had stated in our March 29, 2006 letter, despite past illegalities and the Port Authority's negligence, the Committee to Save Cleveland's Hulett's and the undersigned

would prefer not to work against, but to work with the Port Authority, the City, Oglebay and the Army Corps of Engineers to achieve the following goal: That these unique icons of Cleveland's industrial heritage, innovative origins and visionary citizens – the Hulets – would again stand tall, this time in a proper historic interpretive context, so that they may be appreciated by current and future generations. We look forward to continuing our participation as consulting parties in the Section 106 process and work together towards this goal.

Respectfully,



Stephen L. Merkel, Chairman - for the Committee and listed individuals, as a member and individual

380 Oakmoor Avenue, Bay Village, OH 44140 (440) 835-1720

Edward J. Hauser, as a member and as an individual

11125 Lake Avenue #402, Cleveland, OH 44102 (216) 651-3476

James H. Korecko, as a member and as an individual

13801 Tinkers Creek Road, Valley View, OH 44125 (216) 524-2640

Jerry C. Mann, as a member and as an individual

16259 Oakhill Road, Cleveland Heights, OH 44112 (216) 268-3268

Rimantas Saikus, as a member and as an individual

28400 South Woodland Road, Pepper Pike, OH 44124 (216) 514-7001

cc - John Eddins, Advisory Council on Historic Preservation
jeddins@achp.gov
Charlene Dwin Vaughn, Advisory Council on Historic Preservation
cvaughn@achp.gov
Elizabeth Merritt, National Trust for Historic Preservation
Betsy_Merritt@nthp.org
Committee To Save Cleveland's Hulets and
its members as individual consulting parties
rrs@citizensvision.org
Rep. Dennis J. Kucinich
Marty.Gelfand@mail.house.gov
Franco Ruffini, Deputy SHPO, Ohio
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Tim Donovan, Executive Director, Ohio Canal Corridor
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Sarah J. Beimers, Cleveland Restoration Society
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Landmarks Commission, City of Cleveland

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Cleveland-Cuyahoga County Port Authority

sjacobsen@portofcleveland.com

Cuyahoga County Commissioners

Jimmy Dimora, Timothy F. Hagan, Peter Lawson Jones

cndmm@cuyahogacounty.us

City of Cleveland

Mayor Frank Jackson

ksilliman@city.cleveland.oh.us

Martin Sweeney, Council President

ward20@clevelandcitycouncil.org

Matt Zone, Councilman

mattzone@sbcglobal.net

Scalabrino, Mark W LRB

From: Betsy Merritt [Betsy_Merritt@nthp.org]
Sent: Monday, June 18, 2007 12:30 AM
To: Scalabrino, Mark W LRB; Sisselman, Alan H LRB; jeddins@achp.gov; cvaughn@achp.gov
Cc: Marty.Gelfand@mail.house.gov; fruffini@ohiohistory.org; rkeiser@city.cleveland.oh.us; sjacobsen@portofcleveland.com; cndmm@cuyahogacounty.us; ksilliman@city.cleveland.oh.us; ward20@clevelandcitycouncil.org; mattzone@sbcglobal.net; tdonovan@ohiocanal.org; SBeimers@clevelandrestoration.org; rrs@citizensvision.org
Subject: Section 110(k) determination - Permit # Application No. 1999-01471(4)
Attachments: NTHP comments on Hulett's 110K ltr Corps to ACHP.pdf

Attached please find the comments of the National Trust for Historic Preservation regarding the proposed determination by the Army Corps of Engineers regarding Section 110(k) of the National Historic Preservation Act, as applied to the dredging permit application from the Cleveland-Cuyahoga Port Authority.

Elizabeth S. Merritt, Deputy General Counsel, National Trust for Historic Preservation
1785 Massachusetts Ave. NW, Washington, DC 20036 | Phone: (202) 588-6026 | Fax: (202) 588-6272

The National Trust's Legal Defense Fund works with local preservation advocates around the country to protect historic and cultural resources. Our work is supported by the Trust's membership dues, and is leveraged with generous pro bono assistance from lawyers in the private bar. However, this work would not be possible without contributions from individual supporters. If you would like to make a tax-deductible donation to the Trust's Legal Defense Fund, please click on the following link: www.nationaltrust.org/law/LDF.donate.pdf. To learn more about preservation and the National Trust or to become a Member, please visit our website at www.nthp.org.

6/18/2007



June 15, 2007

BY ELECTRONIC TRANSMISSION

Mark W. Scalabrino
Alan H. Sisselman
U.S. Army Corps of Engineers
1776 Niagara St.
Buffalo, NY 14207

Re: Intentional Adverse Effects Determination Pursuant to 36 CFR 800.9(c)
Application No. 1999-01471(4)

Dear Mr. Sisselman and Mr. Scalabrino:

On behalf of the National Trust for Historic Preservation, thank you for re-circulating the draft letter that the Army Corps of Engineers proposes to send to the Advisory Council on Historic Preservation (ACHP) regarding the applicability of Section 110(k) of the National Historic Preservation Act (NHPA) to the pending permit application by the Cleveland-Cuyahoga County Port Authority for dredging along the dock face of the Cleveland Bulk Terminal. We received our copy of your May 4, 2007 cover letter, along with the attached draft letter to the ACHP by certified mail, on May 14, 2007. Thank you for affording us additional time to comment on the proposed letter.

We strongly agree with the Army Corps' determination that the Port Authority has engaged in "anticipatory demolition" in violation of Section 110(k) of the NHPA. The Port Authority clearly structured its permit application in 1999 with the specific intention to avoid the requirements of Section 106, while carrying out its plan in 2000 to demolish and dismantle the historic Hulett Iron Ore Unloaders. We commend the Army Corps for recognizing that Section 110(k) is applicable here.

However, we are concerned about the "circumstances" cited by the Army Corps as potential reasons for granting the Port Authority's current application for a dredging permit notwithstanding the anticipatory demolition. The five bullet points outlined on page 4 of the Corps' draft letter essentially boil down to two basic issues:

- (A) inventory and documentation of the Hulett's, as addressed in the 1999 resolution issued by the Cleveland Landmarks Commission (Bullets #1, 2, and 4); and
- (B) the impact of the Port Authority's activities on the Cleveland economy (Bullets #3 and 5).

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In our view, this list of “circumstances” is incomplete, and based on inaccurate assumptions. For example, the reference to the resolution issued by the Cleveland Landmarks Commission fails to address the fact that the Port Authority has violated several explicit requirements in that resolution.

When the Cleveland Landmarks Commission issued a certificate of appropriateness to the Port Authority for the removal of the Hulettts on October 26, 1999, that permit was specifically conditioned on the obligation to dismantle and properly store two of the Hulettts, and to work cooperatively toward raising funds for the reconstruction of the Hulettts. All of this was based on a mitigation principle that remains unfulfilled, but which we still endorse today:

The Landmarks Commission endorses as a mitigation approach the re-erection along the Cuyahoga River in the Flats two (2) complete Hulettts as the centerpiece of an interpretive display of Greater Cleveland’s industrial heritage.

In order to realize this vision, the Landmarks Commission articulated specific requirements, which were incorporated as conditions to the demolition permit:

- The disassembly and storage was required to be “undertaken in such a manner as to insure, to the greatest degree possible, that the preserved Hulett Unloader[s] can be relocated, reassembled, and made operational on a suitable interpretive site within [the Flats Oxbow Business Revitalization] District. Shunt engines and sufficient track to support the re-mounted Hulett unit[s] shall also be preserved”
- The stored Hulettts were to be “supported on timber blocking, braced against movement and covered with sisal paper and tarps leaving enough space between the components for air circulation against undue corrosion. Plastic sheet cover shall not be used.”
- A “foundation” was to be formed, consisting of the “Port, Oglebay Norton, preservationists, unions, [and] city officials . . . to raise money for reassembly, location and development of [the] stored Hulett(s).”
- The future location of the stored Hulettts was to be determined by the foundation, but if another location was not determined, the Port Authority was required to “provide at no cost, a location it currently owns in Old River Bed behind [the] CBT dock.”

The Port Authority has virtually thumbed its nose at these permit conditions – failing to store the dismantled Hulettts properly, and taking no steps whatsoever to work with preservationists and others toward planning or fundraising for the reconstruction of the Hulettts. Although the resolution allows for ultimate demolition if funds for reconstruction cannot be raised after five years, the Port Authority has never even *begun* the five-year fundraising process. Instead, the Port Authority simply left the dismantled Hulettts to rust unprotected, and took no further action.

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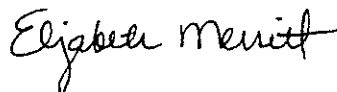
The Port Authority's poor compliance record with respect to the City's permit conditions raises serious concerns about whether the Port Authority could be relied upon to comply with permit conditions issued by the Army Corps. For this reason, we urge the Corps to structure any permit conditions so that mitigation measures regarding the protection and reconstruction of the Hulett's must be satisfied *before* dredging is allowed to proceed. Otherwise, the Army Corps and the public will have little recourse if the Port Authority continues to ignore its responsibilities.

The National Trust is also troubled by the Army Corps' proposed reliance on the Port Authority's role in Cleveland's economy as a special "circumstance" that could "justify" issuing the permit, within the meaning of 16 U.S.C. § 470h-2(k) and 36 C.F.R. § 800.9(c). In our view, the kind of "circumstances" that might warrant issuing the permit should be limited to those that involve minimizing or mitigating harm to the historic property. Under the Corps' proposed rationale, by contrast, an applicant such as the Port Authority could receive whatever permits it seeks, regardless of how egregious its actions or even its bad faith, simply because of its role in the local economy. Reliance on this criterion would send a message that the Port Authority can flout the law with impunity.

The only "circumstances" that would justify issuing the new dredging permit would include stringent requirements for the relocation, reconstruction, and rehabilitation of the Hulett's, in order to minimize and mitigate the Port Authority's intentional damage to these historic structures. Without further consultation, it is premature to determine whether those "circumstances" can be satisfied. Accordingly, the Section 106 consultation process should continue before any decision is made as to whether the "circumstances" would ultimately justify issuing the permit. The Port Authority's position at the initial consultation meeting on February 21, 2007 certainly did not suggest a willingness to abide by permit conditions that might involve meaningful historic preservation requirements. However, the dynamics of the consultation process may lead to a change in the applicant's position. We encourage the Army Corps and the Advisory Council to move forward with consultation in an effort to develop specific permit conditions in order to determine whether they might provide a basis for finding that "circumstances" support issuing the permit.

Thank you again for considering the views of the National Trust. We commend the Army Corps for its conscientious efforts to follow the requirements of Section 110(k) in this difficult case, and we look forward to continuing the consultation process.

Sincerely,



Elizabeth S. Merritt
Deputy General Counsel

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cc - John Eddins, Advisory Council on Historic Preservation
Charlene Dwin Vaughn, Advisory Council on Historic Preservation
Rep. Dennis J. Kucinich
Franco Ruffini, Deputy SHPO, Ohio
Landmarks Commission, City of Cleveland
Cleveland-Cuyahoga County Port Authority
Cuyahoga County Commissioners
Jimmy Dimora, Timothy F. Hagan, Peter Lawson Jones
Frank Jackson, Mayor of Cleveland
Martin Sweeney, President, Cleveland City Council
Matt Zone, Councilman
Tim Donovan, Executive Director, Ohio Canal Corridor
Sarah J. Beimers, Cleveland Restoration Society
Committee To Save Cleveland's Hulets